

**The Role of the International Judiciary in the
Settlement of Environmental Disputes
and Alternative Proposals for Strengthening
International Environmental Adjudication**

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INTRODUCTION¹

The modern proliferation of international courts and tribunals and the increasing use of binding third party adjudication to settle international disputes have neither achieved significant developments in international environmental law nor advanced the state of global environmental governance. In order to prevent further deterioration of natural resources and achieve environmental justice, the international community needs to rethink the existing alternatives for the improvement of the international judicial system.

This paper explores the role that international judicial bodies may play in the settlement of environmental disputes, the potential for improvement of these existing bodies, and proposals for the establishment of new institutions. In Part I, I argue that legal remedies at the international level are necessary for the settlement of environmental disputes; I present the international courts that currently have jurisdiction over environmental cases; and I conclude that the existing international judiciary is incapable of addressing today's global environmental challenges.² In Part II, I explore and evaluate some of the proposals that aim to improve the weaknesses in the structure of the existing international environmental judicial system.

PART I: EXISTING ENVIRONMENTAL JUDICIAL BODIES

National courts and global environmental issues

National courts are not capable of sufficiently addressing international environmental problems. In many cases, the international community requires recourse in international courts and tribunals. Transnational environmental problems often demand supra-national conflict resolution mechanisms, and national courts frequently are not capable of responding to these cases, which address the issue of extraterritoriality.³

However, even if an environmental case solely involves actors within national borders, a national court may not be willing or able to adjudicate actions taken by its government. In many cases,

¹ I express my great appreciation to Prof. Daniel C. Esty and Maria H. Ivanova for granting me the opportunity to work with them on Global Environmental Governance issues at the Yale Center of Environmental Law and Policy during the summer of 2003 and for providing me with valuable comments on this paper.

² In the following analysis, the paper follows the following distinction on the dispute settlement mechanisms: a) diplomatic means including negotiation, consultation mediation, conciliation, and inquiry; and b) legal means including arbitration and judicial settlement (see, art. 33 of the UN Charter). See: e.g. Phillippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, Sweet & Maxwell Publ., London, 2001, p. 337. Although a major percentage of environmental disputes is being resolved by diplomatic means, the paper will refer only to the legal means, because they offer legally binding decisions for the parties to the dispute and have the tendency to produce precedent with a degree of legislative authority.

³ See, Drumbl, Mark A. 1998. *Waging War Against the World: the Need to Move from War Crimes to Environmental Crimes*. *Fordham International Law Journal* Nov. 1998.

national laws impose legal constraints that limit the mandate of the courts to judge and alter governmental actions.⁴ In other cases, national courts may be unwilling to apply international law.⁵ In addition, national judges may possess incomplete knowledge of the application of the highly complex and often contradictory regime of international environmental law.

Required functions of international judicial bodies

The above analysis on the weaknesses of national courts indicates that international judicial bodies are required to respond to the panoply of transnational environmental concerns. International courts are the sole recourse when national courts are unable to accept cases based on grounds of extraterritoriality or lack of national jurisdiction. Furthermore, international tribunals are better positioned to oversee and protect emerging international environmental rights, such as the right to information about polluting activities taking place in a neighboring state. An international judiciary also may exercise control over a nation's activities, which adversely impact the environment of other nations or the global commons. In addition, international judicial control might stand in for inadequate national action in nations where the rule of law does not prevail.

International judicial bodies with environmental responsibilities also should clarify the meaning and status of evolving international environmental law doctrines, such as the precautionary principle. These bodies should have the authority to establish new principles, as well as clarify the legitimacy of rules of customary international law and peremptory environmental norms.⁶

Structure and decisionmaking of existing international judicial bodies

Although no single international court is dedicated solely to environmental issues, a series of international judicial bodies exist for the settlement of international environmental disputes. However, despite the number of available venues, it is unclear whether these institutions are capable of fulfilling the functions described in the previous section. The following summaries present the procedural features and the environmental jurisprudence of several critical global and regional bodies.⁷

⁴ The Greek Supreme Administrative Court (Symvoulío Epikrateias) is able to render a decision that annuls administrative acts of the executive branch, but it is not able to alter a formal, typical statute issued by the executive branch. In some cases, after the annulment of an administrative act by the Supreme Administrative Court, the Government insists on the regulation and issues a formal statute with exactly the same content as of the administrative act, which is then not voidable by the Supreme Administrative Court.

⁵ Rest, Alfred. 1994. Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation. *ENVTL. L. & POLY* 24:173.

⁶ See for example the ascertainment of environmental rules as to the use of nuclear weapons in the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, (1996).

⁷ For the analysis of the dispute – settlement bodies in international environmental law, proceedings under multilateral environmental treaties could be referred. However, such an undertaking is beyond the purpose of this paper. For further study, refer to the interesting “non-compliance procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer.” The Montreal Protocol implementation committee

International Court of Justice (ICJ)

The International Court of Justice (ICJ or the “World Court”) is the principal judicial organ of the United Nations and has general authority over any international law question, including environmental issues.^{8,9} The Statute of the Court includes many conservative procedural provisions, such as the ability of each state to determine whether it chooses to be subject to the decisions of the Court.¹⁰ Each state also has the option to accept ICJ jurisdiction based on a set of limitations and conditions.¹¹ Furthermore, only states themselves can represent their interests before the court, and non-state actors therefore have no standing.

Despite these substantial limitations, the authority of the ICJ is singular within the international judicial system. UN member-states have committed to undertake to comply with the decisions of the Court,¹² and the UN Security Council is authorized to assist the Court by enforcing its decisions.¹³ An important additional procedural step took place in 1993, when the Court established a special seven-member standing Chamber for Environmental Matters to play a more proactive role in environmental disputes.¹⁴ However, because the members of the Chamber are not required to hold any particular expertise on environmental matters, it is doubtful whether the establishment of the Chamber will contribute as essentially as expected to the development of innovative and meaningful environmental jurisprudence. The Chamber has yet to hear case.¹⁵

follows a non-contentious procedure, which includes monitoring the compliance by the states to the Protocol, checking for the reasons that the states do not comply and imposing sanctions in order to bring the states into compliance. It has a quasi-judicial, mostly administrative function, and analysts compare it with the GATTs panels at their early stages. See, Eisen, Joel B. 1999. From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law. *University of Richmond Law Review* January 1999.

⁸ See art. 36 para. 1 of the Statute of the ICJ.

⁹ For general information about the ICJ see: art. 92 – 96 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, latest amendments being at 24 U.S.T. 2225, T.I.A.S. 7739 and Statute of the International Court of Justice, June 26, 1945, 59. Stat. 1055, T.S. No. 993, 3 Bevans 1179, and <http://icj-cij.org>.

¹⁰ See art. 36 para 2 to 5 of the Statute of the ICJ.

¹¹ The ICJ was questioned on the legality of Canadian regulations providing for enforcement actions on the high seas against foreign vessels performing excessive fishing of stocks that migrated between the high seas and Canada's exclusive economic zone. The ICJ dismissed the case on the grounds that according to Canada's reservations to its acceptance of ICJ's jurisdiction, which excluded any dispute relative to the “conservation and management measures taken by Canada with respect to vessels fishing in the [North Atlantic Fisheries Organization] Regulatory Area... and enforcement of such measures” it had no jurisdiction on the case. See, Murphy, Sean D. 2000. Does the World Need a New International Environmental Court? *George Washington Journal of International Law and Economics*.

¹² See art. 94 para. 1 of the U.N. Charter.

¹³ Pursuant to art. 94 para. 2 of the UN Charter: “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

¹⁴ See, Sands, Phillippe. 1999. International Environmental Litigation and its Future. *University of Richmond Law Review* Jan. 1999.

¹⁵ Qiong Wu, Charles. 2002. A Unified Forum? The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration. *Chicago Journal of International Law* Spring 2002.

In its decisions, ICJ has reaffirmed principles of international environmental law, such as Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. However, the judgments have been criticized by academia and civil society as conservative and environmentally insensitive.¹⁶ The Court did not adopt progressive legal interpretations that might have led to important developments of the body of international environmental law and regulation of critical environmental issues.¹⁷ The ICJ has also been criticized for its minimalist approach to decision-making; several notable cases have been dismissed on procedural grounds. In these cases, the dissenting opinion found the majority to be too reductionist and positivist in its legal method and concluded that the ICJ had the duty to undertake a more proactive and flexible approach, in order to make “a contribution to some of the seminal principles of the evolving corpus of international environmental law.”¹⁸

International Tribunal for the Law of the Sea (ITLOS)

The 1982 UN Convention of the Law of the Sea (LOS Convention) established the International Tribunal for the Law of the Sea. The Tribunal was initiated in Hamburg in October 1996.¹⁹ It is an independent judicial body that maintains a close relationship with the UN. According to Article 20 of its Statute, the parties to the LOS Convention can submit disputes to the Tribunal concerning the interpretation and implementation of the provisions of the Convention. The Tribunal also is able to address environmental issues beyond the scope of the Convention because it is authorized to adjudicate cases arising under several other international instruments related to the world’s oceans.

The Tribunal is one of the few international judicial bodies that has compulsory jurisdiction over cases arising under the provisions of its establishing Convention. Although the Tribunal is not the exclusive dispute settlement mechanism available to the parties to the convention²⁰ (cases may be submitted to the ICJ or other arbitration bodies), it has compulsory jurisdiction over specific disputes arising under the articles of the Convention and over cases that are not submitted to other dispute resolution mechanisms.²¹

Despite the number of avenues available for dispute settlement under the LOS Convention, the Tribunal is expected to hear a large number of cases. Its procedures are relatively fast and

¹⁶ Qiong Wu, Charles. 2002. A Unified Forum? The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration. *Chicago Journal of International Law* Spring 2002.

¹⁷ Such as the applicability of multilateral environmental agreements during war time.

¹⁸ See for the discussion of the cases and the presentation of Judge Weeramantry’s dissenting opinion: Prudence, Taylor. 1997. Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case. *Colorado Journal of International Environmental Law* Summer 1997.

¹⁹ The UN Convention for the Law of the Sea opened for signature on Dec. 10, 1982 and entered into force on Nov. 16, 1994. 1833 U.N.T.S. 397.

²⁰ See UNCLOS art. 287.

²¹ UNCLOS Art. 292, 290 para. 5, 288 para. 2 and ITLOS Statute art. 21.

flexible. The expertise of the judges is also one of the main advantages of the Tribunal.²² The Tribunal's Sea-bed Disputes Chamber also has jurisdiction to hear cases brought by "entities other than states", including individual contractors and prospective contractors with the International Seabed Authority. It is conceivable that this provision may permit standing by other non-state entities, but the precise meaning of the provision awaits Tribunal interpretation.

These procedural rules provide the Tribunal with the ability to respond effectively to environmental cases. In the eleven cases that the Tribunal has decided, it has discussed environmental issues and has adopted a protective stance towards the protection of the environment²³.

Dispute Settlement Bodies of the World Trade Organization

Dispute settlement is identified as a principle function of the World Trade Organization (WTO).²⁴ The WTO dispute settlement process begins with consultations and proceeds with GATT conciliation or mediation services. A party may request that the dispute be heard by a panel, which receives submissions from all interested parties and issues a report. The Dispute Settlement Body (DSB) adopts the panel's report unless there is joint opposition to such adoption. Any of the parties to the dispute may appeal the panel's decision to the Appellate Body, a standing body of seven members. Parties are required to implement the panel ruling within a "reasonable period of time." If ruling is not implemented, the injured party may be compensated and retaliatory measures may be undertaken.

Several steps were undertaken during the Uruguay Round to improve the effectiveness of the dispute settlement process. However, these steps did not respond to existing environmental concerns.²⁵ First, the dispute settlement procedures are open onto to WTO members and not individuals or environmental NGOs. Second, the panel proceedings are closed to the public at large. Third, the WTO panels are composed of trade experts, who do not necessarily have the

²² See, also art. 2 of the Statute of the Tribunal according to which the judges must possess expertise in the international law of the sea.

²³ The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea) - 1997, The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) - 1999, Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures - 1999, The "Camouco" Case (Panama v. France) - 2000, The "Monte Confurco" Case (Seychelles v. France) - 2000, Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) - 2000, The "Grand Prince" Case (Belize v. France) - 2001, The "Chaisiri Reefer 2" Case (Panama v. Yemen) - 2001, The MOX Plant Case (Ireland v. United Kingdom) - 2001, The "Volga" Case (Russian Federation v. Australia) - 2002.

²⁴ For the WTO dispute settlement process, see: Annex 2 of the WTO Agreement, as well as Shin, Susan H. 2003. Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations. *New York International Law Review* Winter, 2003.

²⁵ For the deficiencies of the WTO dispute settlement system according to environmentalists, see Brown Weiss, Edith, Stephen C. McCaffrey, Daniel Barstow Magraw, Paul C. Szasz, and Robert E. Lutz, eds. 1998. *International Environmental Law and Policy*. Edited by A. L. Business. Gaithersburg, New York, p. 1038.

expertise to make sound decisions on environmental matters. Finally, the WTO panels are not required to take into consideration international law regimes such as international environmental agreements and the customary international law. WTO agreements have created a “self-contained and self-referential” regime.²⁶ Despite efforts to achieve consistency between existing multilateral environmental agreements and the trade regime, these two have not been adequately integrated²⁷.

European Court of Justice (ECJ)

The European Court of Justice (ECJ) plays an essential and meaningful role within the European Community (EC). National courts and governments tend to respect its decisions.²⁸ While it is not a specialized environmental court, ECJ is authorized to hear environmental cases on grounds of non-compliance of a Member State with the European Community’s environmental laws. ECJ also is authorized to render preliminary rulings on the interpretation of primary or secondary European Law, including environmental law. ECJ structure does not provide for a specialized chamber on environmental issues. However, due to the complexity of environmental cases, there is a de facto specialization among the Advocates General.²⁹ Access to the court is open to the Commission, European Union institutions, Member States, and natural or legal persons directly subject to European laws. Based on these procedural requirements, non-governmental organizations have been excluded from the ECJ.³⁰

The ECJ has contributed to the protection of the natural environment in the European region. It has accepted more than 150 environmental cases and has rendered important environmental jurisprudence. It was the first Court to acknowledge many principles of international environmental law such as the precautionary principle.³¹ As national courts have funneled

²⁶ Phillippe Sands, speech at the New York Law School Center for International Law Symposium on World Trade and the Environment, 19 (1) N.Y.L. Sch. J.Int’l & Comp.L. (1999), pp. 163 – 194.

²⁷ Many notable WTO decisions (e.g. Reformulated Gasoline, Tuna-Dolphin, Shrimp-Turtle, Beef Hormone, Apples) have attempted to balance environmental and trade concerns and have been discussed at length in other trade-and-environment publications. See Daniel C. Esty, “Bridging the Trade-Environment Divide,” *Journal of Economic Perspectives* 15:3, 2001.

²⁸ ECJ’s role proved to so powerful in the E.C. structure that the age-old charges of “gouvernement par juges” were raised again. See, Slaughter, Anne - Marie. 1999 - 2000. Judicial Globalization. *Va. J. Int’l L.* 40:1103.

²⁹ Kremlis, George. 2001. European Perspectives on Access to Justice in Environmental Matters. In *Biopolitics - The Bio - Environment - Racing to Save the Environment*, edited by A. Vlavianos - Arvanitis. Athens: Biopolitics International Organization. The author analyses also the impact of the Aarhus Convention at the EC laws concerning the access to justice.

³⁰ For further details on the NGOs access to ECJ, see analysis by Kremlis, George. 2001. European Perspectives on Access to Justice in Environmental Matters. In *Biopolitics - The Bio - Environment - Racing to Save the Environment*, edited by A. Vlavianos - Arvanitis. Athens: Biopolitics International Organization. The author analyses also the impact of the Aarhus Convention at the EC laws concerning the access to justice.

³¹ See a series of cases, where the ECJ applied implicitly or explicitly the precautionary principle: case C-405/92, Armand Mondilt S.A. v. Armement Islais SARL, 1993, E.C. RI-6133 on the prohibition of drift-nets; case C-180/96, U.K. v. Comm’n, 1996, E.C.R. I – 3903, rejection of a request for provisional measures to lift the ban on beef after the Kreuzels Jacobs’ disease; case T-199/96, Labs. Pharmaceutiques

preliminary questions to the ECJ, it has succeeded in clarifying environmental rules and has influenced both the harmonization of the application of EC environmental law and the development of national environmental law. In addition, ECJ, as a multi-issue court, has been able to evaluate and balance environmental protection in conjunction with other public interests such as economic development.

European Court of Human Rights (ECHR)

The European Court of Human Rights (ECHR), established under the auspices of the Council of Europe in 1950, is entrusted with monitoring state-party compliance with the European Convention on Human Rights and Fundamental Freedoms (the Rome Convention). ECHR has developed progressive interpretations of legal documents for the protection of human rights and is a very successful example of a regional judicial body. However, ECHR is restricted in its environmental role because the Court examines violations of human rights as they are identified in the Rome Convention and its additional Protocols. Neither the Convention nor the Protocols provide for a human right to a clean environment.³² In the past, the court has been very flexible and innovative in interpreting the existing articles. It has attributed compensation to individuals suffering from environmental harm or noise pollution through application of Article 8 (protection of private life and family life.)³³ However, similar “environmental” decisions have not been forthcoming. The Court stated in the recent *Kyrtatos* case that it is unable to provide comprehensive environmental protection due to the limits of the Convention and its additional Protocols.³⁴

African Court on Human Rights

The African Commission is the only functioning international regional body with power to “promote” and “protect” rights and “interpret” provisions of the African Charter of Human and

Bergaderm S.A. & J. J. Goupil v. Comm’n, 1998 E.C.R. II – 2805, prohibition of use of certain chemicals in sunscreen cosmetics.

³² The Draft Protocol to the European Convention of Human Rights, which declares a human right to the environment, has not been adopted thus far. Draft Protocol to the European Convention on Human Rights and Fundamental Freedoms, reprinted in *Human Rights in a Changing East-West Perspective* 216, 229 (1990).

³³ See, e.g. the famous *Lopez Ostra* case, (1994).

³⁴ As the Court stated in *Kyrtatos v. Greece* case, Strasbourg, 22 May 2003: “With regard to the first limb of the applicants’ complaint, the Court notes that according to its established case-law, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *Lopez Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51). Yet the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person’s private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.”

People's Rights³⁵ on the African continent.³⁶ In response to criticisms of the inability of the African Commission to stop the massive and systematic violations of human rights on the continent³⁷, on June 1998, the Organization of African Unity – now the African Union (AU) – adopted the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court of Human and People's Rights.³⁸

The Protocol establishing the Court has not yet come into force because it lacks the necessary number of ratifications.³⁹ The Court will have jurisdiction over any case concerning the interpretation and the application of the African Charter, as well as any human rights instruments ratified by the parties. States, intergovernmental organizations, NGOs, and individuals will have access to the Court and will be able to file claims against any state. Access to the Court by NGOs and individuals is, however, constrained by the requirement that the case be urgent, serious, or relating to massive violations of human rights.

Lacking any jurisprudence, I am not able to evaluate the work of the Court. In the future, developments of the jurisprudence of the Court will be interesting because the Court applies the African Charter, which explicitly recognizes a human right to a satisfactory environment.⁴⁰

International Criminal Court (ICC)

The Charter of the International Criminal Court was signed in Rome on July 17, 1998, and came into force on July 1, 2002.^{41,42} According to Article 5, ICC has jurisdiction over the most serious international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. The Charter grants partial protection to the environment: Article 8 identifies as a war crime the intentional launch of “an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct

³⁵ African Charter of Human and People's Rights, June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev.5, 21 ILM 59 (1982).

³⁶ For the purposes of the African Commission see, art. 45 of the African Charter of Human and People's Rights.

³⁷ Udombana, N. J. (2000). "Toward the African Court on Human and People's Rights: Better Late Than Never." *Yale Human Rights and Development Law Journal* 3(45).

³⁸ The court was established by the Protocol on the Establishment of a Court of Human and People's Rights, AU Doc. OAU/LEG/MIN/AFCHPR/PROT. III (1998). For the text of the Protocol see: <http://achpr.org>.

³⁹ The Protocol demands for fifteen ratifications before the Court be established, art. 34 (4).

⁴⁰ Yemi, A.-G. (2002). "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights." *U.Miami Int'l & Comp.L.Rev.* 10: 159 - 175. See also Philip Alston, Making Space for New Human Rights: the Case of the Right to Development, in 1 *Harv. Human Rights J.* 3, 3 – 4 (1988).

⁴¹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc.A/CONF.183/9 (1980).

⁴² For a general presentation, see, Iai, Ivano, 2001. “Environmental Aspects of the Charter of the International Criminal Court.” In *Biopolitics - The Bio - Environment - Racing to Save the Environment*, edited by Agni Vlavianos - Arvanitis. Athens: Biopolitics International organization.

overall military advantage anticipated.” This provision is very narrow.⁴³ In addition, ICC has jurisdiction only over individuals and not over states, which further limits the degree of environmental protection that the Court is able to offer. The Court has not yet rendered any judgements.

Ad Hoc War Crimes Tribunals

The International Criminal Tribunal for the Former Yugoslavia (ICTY)⁴⁴ and the International Criminal Court for Rwanda are ad hoc international criminal tribunals established to prosecute persons responsible for serious violations of internal humanitarian law committed during specific conflicts. The United Nations Security Council established the tribunals as enforcement measures under Chapter VII of the United Nations Charter. According to the Charter, all states are obliged to contribute to the enforcement of Tribunal decisions.⁴⁵ However, both Tribunals have limited mandates, which do not include environmental desecration caused during armed conflict.

Evaluation of existing international judicial bodies

Based purely on the small number of environmental cases adjudicated by international courts, it is possible to conclude that existing courts do not satisfactorily consider environmental issues. Furthermore, the conservative outcomes of the cases indicate that existing international courts may not properly adjudicate even the limited number of environmental cases that come before them.

Reasons for the dearth of environmental cases include traditional political and legal obstacles such as state sovereignty, the doctrine of consensual jurisdiction⁴⁶, and the requirement for prior

⁴³ The provision criminalizes the “long-term and severe environmental damage” only if such damage will be “clearly excessive in relation to the... military advantage anticipated”. The “long-term and severe damage” itself is not criminalized by the Charter of the ICC and does not constitute a war crime, unless it is disproportionate in relation with the military advantage that the part which initiated the attack wishes and has anticipated.

⁴⁴ The full name of the Court is: the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

⁴⁵ For further details about the mandate, organization and function of the war crimes tribunals, see: Phillippe Sands & Pierre Klein, *Bowett’s Law of International Institutions*, Sweet & Maxwell Publ., London, 2001, p. 383.

⁴⁶ For an international court to be able to seize a case, all the states that are parties to it should have a priori consented to the jurisdiction of the court. Their consent could concern either a specific case, a group of cases, or all the cases involving the state. This requirement, called the consensual jurisdiction doctrine, is rooted in state sovereignty doctrine. In case that a state is not willing to acknowledge the jurisdiction of the court, the court is not legally competent to seize the case and the state will have no obligation to respect such decision and will remain immune from any enforcement attempt. The doctrine of consensual jurisdiction imposes quantitative limitations on the number of the cases that international tribunals adjudicate, especially if the polluter state has not consented to the jurisdiction of the court.

exhaustion of local remedies.⁴⁷ In addition to these common deficiencies, at least two distinct characteristics of environmental disputes often prevent their adjudication. First, there exists no structured system for the settlement of environmental disputes. Second, international institutions face procedural deficiencies.

At the international level, the avenue for adjudication of environmental cases is not clearly defined. There is no specific international court with jurisdiction over environmental disputes where interested parties can submit an environmental case. If the case is not connected with the law of the sea, trade violations, human rights violations, or specific criminal behavior, the parties might find no forum available for the adjudication of their case. Furthermore, the international judicial system is not connected with national judicial systems. There is no mechanism for deference or appeal from national courts to international courts. In addition, many multilateral environmental treaties do not specifically reference adjudication in international courts. As a result, parties to a dispute are often discouraged from pursuing international dispute settlement procedures.

Several procedural provisions of international adjudication impose obstacles to the admission and the effective handling of cases and either disable or discourage the interested parties to submit their cases. First, individuals are effectively prohibited from bringing cases before the courts, with the exception of limited possibilities offered in the framework of the human rights courts.⁴⁸ Second, most environmental cases are complex and large-scale, and the slow process of Tribunal decisions is unable to address environmental degradation that requires immediate response.⁴⁹ Finally, the efficacy of the courts suffers from a lack of enforcement power. State parties to the dispute are responsible for complying with court decisions. However, in a case of non-compliance, only the ICJ, the WTO dispute settlement bodies, and the ECJ have enforcement mechanisms.

⁴⁷ The requirement of the prior exhaustion of local remedies before the recourse to an international judicial body plays a double role in the access to international adjudicatory bodies for environmental cases: while there is such a requirement for the majority of the tribunals, e.g. the human rights tribunals, that poses an additional obstacle to access to environmental friendly bodies – there is no such requirement for access to judicial bodies that function in the framework of regimes potentially adverse to the environment, such as the ICSID, or ad hoc bodies established by bilateral investment treaties (BITs). Sands, Phillippe. 2002. Searching for Balance: Concluding Remarks. *N.Y.U. Envtl.L.J.* 11:198

⁴⁸ As successfully noted, “in 1995, claims made by individuals concerning French nuclear tests in the South Pacific were rejected for lack of jurisdiction by the European Commission of Human Rights, the Human Rights Committee, and the Court of Justice of the European Communities.” Rogers Kalas, Peggy. 2001. International Environmental Dispute Resolution and the Need for Access by Non - State Entities. *Colorado Journal of International Environmental Law* Summer 2001:191 with reference at: Prudence Taylor, Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Cases, 8 *Colo.J.Int'l Envtl.L.& Pol'y* 199 (1997).

⁴⁹ See, the comments of Sean D. Murphy who persuasively describes that the existing courts are able to develop mechanisms, so as to react fast also in these situations. Murphy, Sean D. 2000. Does the World Need a New International Environmental Court? *George Washington Journal of International Law and Economics*.

These weaknesses demonstrate the inability of most existing judicial bodies to effectively address major international environmental issues. Most of the courts were established in order to serve a specific treaty or international organization, and they are limited in their subject matter jurisdiction. The courts are obliged to deal with environmental issues only in relation to other fields of international law or while seeking to serve different purposes, such as the promotion of free trade or the protection of human rights.

Exactly because these bodies are not structured to judge environmental cases, their staffs lack the expertise to do so. Non-specialized international judges often are unable to apply the complex, vague and incomplete norms of international environmental law. ICJ itself, in the Gabcikovo-Nagymaros Project case admitted that the application of the international environmental law is not an easy task.⁵⁰ In that case, the ICJ judges had to be educated in the environmental and scientific aspects of the dispute before they judged the case.⁵¹

Finally, in most cases, international tribunals seem to follow a “minimalist” view, through which they focus on the specific settlement of disputes between the parties and devote only minimal attention to the broader policy implications of their judgments for the development of law. Scholars have noted this approach in many of the ICJ decisions.^{52,53} This “minimalist” perspective limits the broader consideration of environmental issues associated with specific disputes.

PART II: REMEDIES TO THE EXISTING JUDICIAL SYSTEM

The international community may remedy these weaknesses using either or both of the following two approaches: (a) improvement of the laws and procedures of the existing judicial institutions⁵⁴

⁵⁰ Eisen, Joel B. 1999. From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law. *University of Richmond Law Review* January 1999.

⁵¹ See, <http://www.icj-cij.org/idoctek/ihs/ihsjudgement/ihsjudcontent.html>>. Mark A. Drumbl, in his article: Waging War Against the World: the Need to Move from War Crimes to Environmental Crimes. *Fordham International Law Journal* Nov. 1998, comments the procedure of the environmental training of the judges as one additional time and funds consuming element of the international judicial procedures and supports the establishment of an International Court of the Environment.

⁵² See, Sands, Phillippe. 1999. International Environmental Litigation and its Future. *University of Richmond Law Review* Jan. 1999. Eisen, Joel B. 1999. From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law. *University of Richmond Law Review* January 1999. Prudence, Taylor. 1997. Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case. *Colorado Journal of International Environmental Law* Summer 1997.

⁵³ Alternative dispute resolution bodies, which judge the majority of the environmental cases discussed at the international level, follow by definition this attitude.

⁵⁴ See, Murphy, Sean D. 2000. Does the World Need a New International Environmental Court? *George Washington Journal of International Law and Economics*, who suggests that there is no need for a new international environmental institution to be established, because the currently existing institutions are able to improve their own statutes and address the need for effective environmental protection. Despite the poor analysis on the issue, the article is interesting to the point that it flashes out the abilities and some of the ways the current judicial institutions pose in order to be ameliorated.

and (b) promotion of a specialized environmental dispute settlement body, which will decisively contribute to environmental justice and the effective protection of the environment.

Reform of existing international bodies

International courts must make some adjustments if they are to be the venues for adjudication of environmental cases. The adjustments could be of three different types: changes to the substantive applicable law of the courts; changes to the procedural rules that control the work of the courts; and changes to the mandates of the two principal bodies of the United Nations, the Security Council and the International Court of Justice.

Changes to the substantive laws of the courts

Courts tend to be as environmental friendly as their constituent treaties and existing legal instruments. The International Tribunal for the Law of the Sea is an environmentally friendly tribunal largely because it applies the Law of the Sea Convention, which attributes a high degree of protection to the marine environment. In addition, the majority of the other treaties that the Tribunal applies concerning the marine environment tend to be relatively environmentally friendly and progressive. At the other extreme, regardless of the intentions of the European Court of Human Rights, in the absence of an article recognizing the right to the environment at the European Convention of Human Rights, the court is destined to provide only limited protection. Therefore, the initial step should be revising the agreements that limit the law applied by the courts.

A second logical revision is updating the procedural rules and the composition of the judiciary. This may involve improving the efficiency of existing procedures by providing individuals with standing or by altering the requirements for demonstrating burden of proof. Recent discussions have focused on the need of the courts to be staffed by judges who are experts on environmental issues. Other proposals have been put forward regarding the inclusion of other subject matter experts in the judicial process.

The International Court of Justice as an Appellate Body

The ICJ could promote environmental protection by acting as an appellate body for decisions on environmental cases issued by other international courts. In this role, the ICJ could contribute to the harmonization of the environmental policies produced by case law at the international level and also respond to concerns about fragmentation of law due to of contradictory jurisprudence issued by multiple bodies. The ICJ may take on this appellate function through three mechanisms: interpreting that the UN Charter already permits an appellate function for the ICJ; amending the UN Charter and the Statute of the ICJ to explicitly empower the ICJ with appellate powers; or developing separate agreements between the ICJ and other international tribunals creating a hierarchy with ICJ at the apex.

The United Nations Security Council as an Enforcement Mechanism

International law enforcement authority remains nonhierarchical and is distributed throughout the international system. The only organ with enforcement powers remains the executive organ of the United Nations, the United Nations Security Council. Through an amendment of the UN Charter, the Security Council could exert greater control over environmental issues. For example, the Security Council could enhance its role as the enforcement mechanism for international and national judicial decisions; function as a judicial body; obligate all states to accept the jurisdiction of international judicial bodies with environmental authority; or impose compulsory uniform environmental legislation for all states. However, such proposals would require ratification by two-thirds of UN members including the permanent members of the Security Council; such agreement seems politically unfeasible.

Without an amendment of UN Charter, an expansion of Security Council powers is possible through a broader interpretation of what constitutes breach of peace and security. It is conceivable that a breach of peace and security might be constituted by extensive environmental degradation or a conflict over the allocation of natural resources.⁵⁵ Several existing Security Council functions also offer opportunities for environmental enforcement. In the event of one party's non-compliance with an ICJ decision, the other party may petition the Security Council to take all measures required to implement the decision. In rare cases, the Security Council also has the ability to function as a quasi-judicial organ. It is also conceivable that the Security Council could establish a separate international environmental court, on the model of the Rwanda and Yugoslavia tribunals.

Creation of a new institution

An International Court for the Environment – ICEF's proposal

Several proposals have been presented for the development of a court capable of judging exclusively environmental cases. The most detailed, well-developed proposal has been submitted by the International Court of the Environment Foundation (ICEF). The Foundation has already promoted worldwide the idea of establishing the court, which has gained support in both the political world and in academia. Because ICEF's project is the one that seems to have the greatest prospects for implementation, this paper discusses only the ICEF proposal⁵⁶.

⁵⁵ "The Council, of course, can orchestrate measures of enforcement by the world community in the form of economic or diplomatic sanctions or even military force if it considers that such measures are required to preserve peace and security, which may sometimes, though probably rarely, be endangered by noncompliance with a judgment in an environmental dispute." Edith Brown Weiss, p. 217.

⁵⁶ Other proposals include an international court modeled on the United Nations Compensation Commission, an international criminal court for the environment, a World Environment Court (WEC) modeled on the concept of a World Environment Organization (WEO), and the International Court of Environmental Arbitration and Conciliation as a future World Court of the Environment.

ICEF was established in 1989 in order to promote development of the International Court of the Environment. ICEF launched an international campaign and made preparations to promote the proposal at the UN Conference in Rio de Janeiro, Brazil in 1992. As part of these preparations, ICEF presented its idea to the European Communities, which strongly supported the concept. In 1991, the European Parliament itself adopted a Resolution regarding the proposed court in order for the issue to be promoted at the Rio Conference. The EC Resolution, however, was never discussed, despite the presence of ICEF at the Rio Conference.⁵⁷ Despite the setbacks at Rio, ICEF soon achieved the support of the UN Commission on Sustainable Development. Several states, departments of states, local authorities, NGOs, private corporations, and international organizations also have expressed their support^{58,59}.

Institutional framework of the Court

The International Court of the Environment is intended to be a permanent organ with global jurisdiction, comprised of 15 independent judges, elected by the United Nations General Assembly (UNGA) and paid out of the budget of the United Nations. States and non-state actors, such as intergovernmental organizations, non-governmental organizations and individuals, will have access to the Court.

The subject-matter jurisdiction of the court will include every environmental dispute that has caused or may cause substantial environmental damage at the international or national level and has not been settled through arbitration within a period of 18 months. The court will also be able to act preventively, by rendering preliminary measures. It will be able to carry out investigations and inspections either upon request or ex officio, in the case of urgency. It will provide services of arbitration and advisory opinions on global environmental issues. In addition, it will respond to requests of preliminary ruling by national courts, according to the successful example of the European Court of Justice. Civil remedies shall include interlocutory or perpetual injunction. The court will be able to issue orders for redress of an injured individual, for payment of the cost for the restoration of the damaged environment, or for payment into a World Environmental Fund. The UN Security Council will be entrusted with enforcement of the judgments.

Relationship with other international courts

⁵⁷ At the Rio Conference the ICEF presented a special volume on the issue, entitled: "The Global Village Without Regulations", Giunti Editore, Florence, 1992.

⁵⁸ As expected, international NGOs, such as the Biopolitics International Organization, the Center for International Environmental Law, the IUCN, and the International Department of the Friends of Earth, the Conseil International de Liaison pour une Autorité Mondiale de l' Environnement (C.I.L.A.M.E.)⁵⁸, the United Nations Association of Sri Lanka, and numerous local NGOs and environmental interests groups, academic institutions, such as the George Washington University, the Catholic University of America, the University of Cologne, the Erasmus University of Rotterdam. The Court initiative has received the support also of professional groups, such as the International Bar Association, the American Bar Association, the Japanese Federation of Bar Associations, individual lawyers from law offices, legal advisors from departments of states, diplomats, chief justice of national courts, as well as private enterprises, such as ENEL and Alitalia.

⁵⁹ See the correspondence at ICEF's website at <http://www.icef-court.org/icef/goverments>.

The development of a system that connects international courts will be required to distribute cases among the ICE and other international judicial bodies.⁶⁰ Provisions establishing closer cooperation between the courts would be useful. By creating a system of international courts through agreements of cooperation, international courts—according to the judicial practices in many national jurisdictions—could defer cases that are not primarily under their jurisdiction to another more appropriate court. International courts could establish terms on common rules that define the appropriate body. Such a system will enable further cooperation among the courts.

Legal hurdles and policy obstacles

The Statute of the International Court for the Environment proclaims that the Court will protect the right of everyone to a clean environment. However, the international community has not yet recognized such a right, and there are only a limited number of treaties that have adopted it. The difficulty associated with reaching agreement on this right may jeopardize the success of the Court. However, the adoption of specific categories of subject-matter jurisdiction by the Court is not a satisfying option, due to the seeming limitless number of environmental issues and likelihood that critical issues would be excluded.

In order to avoid the problems associated with the delineation of subject-matter jurisdiction of the Court, the multilateral environmental agreements (MEAs) should recognize the Court as a venue for the settlement of their disputes. ICE need not be the exclusive dispute settlement mechanism, but the MEAs should include jurisdictional consent clauses to provide signatories with the opportunity to approach the Court with their disputes. To avoid delineating subject-matter jurisdiction, the Court should apply existing principles of international environmental law, multilateral and bilateral agreements, general international law and, where appropriate, national laws.⁶¹

Many critics have argued that the establishment of ICE is ill-advised because environmental issues are inherently intertwined with other concerns. However, the difficulties of charactering a case as environmental should not lead to the conclusion that the establishment of the Court is unwise. Many disputes may not be exclusively environmental in nature, but they doubtlessly present prevailing environmental concerns such as the pollution of freshwater resources or the management of hazardous wastes. Additionally, the Court will serve as a counterweight to jurisprudence promulgated by dispute settlement bodies functioning under regimes that promote values potentially opposite to the protection of the environment. As it was cited by the EEC Study on “The Idea of an International Court of Justice for the Environment,” “above all, however, there is something to be said for charging a special court with international

⁶⁰ See similar analysis in connection with the International Criminal Court capacity to judge cases by William W. Burke – White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 *Mich. J. Int’l L.* 1.

⁶¹ See, Juni, Robin L. 2000. *The United Nations Compensation Commission as a Model for an International Environmental Court.* *Envtl.Law.* 7 (53).

environmental issues, which are increasingly becoming a matter of life or death, rather than handling them over as an additional task to a judicial body which already exists... the idea of setting up an international environmental court in the form suggested [by ICEF] should be supported.”

CONCLUSION

National courts are not adequate to fully deal with environmental cases arising at the international level or, in some cases, even at the national level. Many environmental issues are transboundary in nature and require international institutions to manage them. In the process of globalization of the contemporary society, more and more transactional activities affect adversely the natural environment. Under these conditions, the control of environmental degradation is the responsibility of international judicial bodies.

Current international judicial bodies function under regimes whose purposes and values are not always aligned with that of environmental protection. Some of these bodies were established in an environmentally innocent era, when the protection of the environment was not elevated as a fundamental societal value at the international level. Their procedural rules do not accommodate needs of environmental victims. The international courts function within the nascent frameworks of international law and often lack compulsory jurisdiction and enforcement mechanisms.

In response to these weaknesses, there is a growing public demand for the solution of environmental crises⁶², and “recent case-law indicates a growing willingness of States and other actors to have recourse to international mechanisms to resolve disputes relating to natural resources and the environment.”⁶³

Although many proposals have been presented to rectify existing bodies, none of this is sufficient on its own. An international environmental court is necessary. The academic community and the framers of the court should study carefully the successful examples of current international judicial bodies, adopt features from the well-structured national judicial systems, and be innovative as to the creation of new rules that would provide the new bodies with the power to meaningfully contribute to the protection of the natural environment and human well-being. Political leaders and actors at the international level, including civil society, have to reevaluate the current international structure and consent to the creation of an international judicial system with the purpose of promoting the rule of law and protecting our global environment.

⁶² See, Resolutions Adopted by Biopolitics International Organization with Support of ICEF, at: <http://www.icef-court.org/icef/presentation/athens00.htm>.

⁶³ See, website of the Permanent Court of Arbitration, www.pca-cpa.org